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IN THE
COURT OF APPEALS OF INDIANA

ANDREW LEE WATTS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0506-CR-249
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION, ROOM 1
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0308-MR-00008

September 7, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a jury trial, Appellant, Andrew Lee Watts, was convicted of Voluntary Manslaughter as a Class A felony[1] and Criminal Recklessness as a Class C felony.[2] Upon appeal, Watts presents three issues for our review: (1) whether the trial court erred when it instructed the jury on the lesser included offense of voluntary manslaughter, (2) whether the trial court committed fundamental error in failing to instruct the jury on the definition of sudden heat, and (3) whether the trial court abused its discretion in imposing aggravated and consecutive sentences.

We affirm.

The facts most favorable to the convictions reveal that on the night of August 23, 2003, Roy Atkins, whose nickname was "Champ," went to the Face to Face Lounge in Gary, Indiana. Watts, whose nickname is "Pissy," was also at the Face to Face Lounge and was accompanied by his friends Ronald Crawford, Roy McDuffie, and others. That night, Atkins was involved in a verbal altercation with Watts, Crawford, and McDuffie, which appeared to be gang-related. Gary Police Officer Anthony Boleware was at the Face to Face Lounge working undercover and witnessed the altercation. Officer Boleware observed Atkins, who attracted his attention because he was being "loud," approach a group of men, which included Watts, Crawford, McDuffie, and others, as they were standing in the corner of the Lounge. Two other bar patrons, Roshonda Crump and Justin David, also observed Atkins's loud demeanor and his encounter with the group of individuals.

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[1] Ind. Code § 35-42-1-3 (Burns Code Ed. Repl. 2004).

[2] Ind. Code § 35-42-2-2 (Burns Code Ed. Repl. 2004).

Atkins first approached Watts and was "getting in [his] face," yelling, "I ain't going nowhere. This ain't over, all right. Fuck y'all. I'm right here. If you want me, come get me. I ain't going nowhere." Transcript at 437, 214. Atkins then repeated this same sentiment to each individual standing within the group. Perhaps because of Boleware's close proximity to the group that had gathered in the corner, Atkins made the same statement to the officer. As Atkins turned to walk away, four to five shots rang out in rapid succession. Officer Boleware looked toward the corner where the shots came from and saw the shooter holding a gun and then run down a back hallway. Roshonda Crump also looked toward the corner where she saw the shooter and also saw "fire from the gun." Transcript at 349. Justin David observed the shooter pull the gun from his waistband and fire shots at Atkins. After being shown photographic line-ups, Officer Boleware, Roshonda Crump, and Justin David each positively identified Watts as the shooter. At approximately 3:30 a.m. on August 24, Atkins died as a result of injuries sustained from three gunshot wounds to the back. Roshonda Crump was shot in the knee.

On August 27, 2003, the State charged Watts with murder. On September 4, 2003, the State filed an amended information adding charges for battery as a Class C felony and criminal recklessness as a Class C felony. A jury trial was held from February 28, 2005 through March 5, 2005, at the conclusion of which the jury found Watts guilty of voluntary manslaughter as a lesser included offense of murder and criminal recklessness. After a sentencing hearing held on May 2, 2005, the trial court sentenced Watts to an enhanced sentence of forty-seven years for voluntary manslaughter and an

enhanced sentence of six years for C felony criminal recklessness. The court ordered the sentences served consecutively for a total aggregate sentence of fifty-three years.

Upon appeal, Watts argues that the trial court erred in instructing the jury on voluntary manslaughter over his objection because he claims that there was insufficient evidence of sudden heat. The State requested a final instruction on voluntary manslaughter after Watts requested final instructions on the lesser included offenses of reckless homicide and involuntary manslaughter.[3] Watts objected to the State's request, arguing that he had not interjected evidence of sudden heat. The trial court overruled Watts's objection and instructed the jury regarding voluntary manslaughter, of which the jury ultimately found Watts guilty.

Instructing the jury is left to the sound discretion of the trial court, and we will not reverse absent an abuse of that discretion. Clark v. State, 732 N.E.2d 1225, 1230 (Ind. Ct. App. 2000). Further, we note that instructions upon lesser included offenses given over a defendant's objection have been approved by our Supreme Court and by this court. See e.g., Wilkins v. State, 716 N.E.2d 955 (Ind. 1999); Porter v. State, 671 N.E.2d 152 (Ind. Ct. App. 1996), trans. denied. To be sure, a trial court's determination as to whether to give instructions on lesser included offenses does not depend upon which party tenders them and whether or not the other party poses an objection. Garrett v. State, 756 N.E.2d 523, 528 (Ind. Ct. App. 2001), trans. denied.

[3] Under Watts's version of events, which he set out in his statement to police and in his trial testimony, Watts simply picked a gun up off of the floor and as another individual struggled with Watts to get the gun back, the gun fired, striking the victim. Watts's account of the events of that night supported the giving of the instructions on the lesser included offenses of involuntary manslaughter and reckless homicide.

The test for when a lesser included offense instruction is appropriate, if not required, was set out by our Supreme Court in Wright v. State, 658 N.E.2d 563 (Ind. 1995). Under the Wright test, we first determine whether the lesser offense is either inherently or factually included in the offense charged. Id. at 566-67. There is long-established precedent which holds that voluntary manslaughter is an inherently lesser included offense of murder. See O'Conner v. State, 272 Ind. 460, 465, 399 N.E.2d 364, 368 (1980); McDonald v. State, 264 Ind. 477, 483, 346 N.E.2d 569, 574 (1976); Washington v. State, 685 N.E.2d 724, 727 (Ind. Ct. App. 1997); Landers v. State, 165 Ind. App. 221, 238, 331 N.E.2d 770, 780 (1975). To be sure, voluntary manslaughter is simply the crime of murder mitigated by evidence of sudden heat. Washington, 685 N.E.2d at 727.

Because the lesser offense of voluntary manslaughter is included in the charged offense of murder, we must next determine whether a serious evidentiary dispute exists as to which offense the defendant committed. See Wright, 658 N.E.2d at 567. This is the crux of Watts's argument in that he contends that there was no evidence of sudden heat, let alone a serious evidentiary dispute, and therefore, the trial court should not have given the lesser included offense instruction on voluntary manslaughter.

Killing in the sudden heat of passion is the feature which distinguishes voluntary manslaughter from murder. Washington, 685 N.E.2d at 727. Sudden heat, however, is not a positive element of the crime of voluntary manslaughter, but rather a mitigating factor for conduct which would otherwise constitute murder. Gilley v. State, 560 N.E.2d 522, 523 (Ind. 1990) (citing Russell v. State, 275 Ind. 679, 684, 419 N.E.2d 973, 976

(1981)). Sudden heat is demonstrated by evidence of anger, rage, sudden resentment, or terror that is sufficient to obscure the reason of an ordinary man. Washington, 685 N.E.2d at 727. There must be sufficient provocation to induce such passion to render the defendant incapable of cool reflection. Id. Generally, insulting or taunting words are not sufficient provocation to reduce murder to voluntary manslaughter. Jackson v. State, 709 N.E.2d 326, 329 (Ind. 1999).

We agree with Watts that there was no evidence of sudden heat before the jury. Under the evidence presented by the State, the victim approached Watts and the others, got in their faces and in a loud tone of voice stated, "I ain't going nowhere. This ain't over, all right. Fuck y'all. I'm right here. If you want me, come get me. I ain't going nowhere." Transcript at 214. As the victim turned to walk away, Watts shot him three times in the back. While the victim got in Watts's face in somewhat of a verbal confrontation, such is not the type of provocation that the law recognizes as sufficient to cause one to abandon all reason under sudden heat. Thus, under the Wright test, there was no appreciable evidence of sudden heat that justified an instruction on voluntary manslaughter. This, however, does not necessarily equate to a finding of reversible error.

We first note that in Wilkins, 716 N.E.2d at 957, our Supreme Court acknowledged that it had not yet explicitly addressed whether giving an instruction in the absence of a serious evidentiary dispute is per se reversible error under Wright. Here, we need not address such issue, for there is a series of pre-Wright cases which hold that if the evidence supports a conviction for murder, the jury has a right to find the defendant guilty of voluntary manslaughter, even in the absence of sudden heat. Griffin v. State,

644 N.E.2d 561, 564 (Ind. 1994); Gilley, 560 N.E.2d at 523-24; O'Conner, 272 Ind. at 465, 399 N.E.2d at 368; McDonald, 264 Ind. at 484, 346 N.E.2d at 574; Landers, 165 Ind.App. at 238, 331 N.E.2d at 780; Hopkins v. State, 163 Ind.App. 276, 286, 323 N.E.2d 232, 239 (1975). Our Supreme Court has acknowledged that it has not yet addressed the continued viability of pre-Wright cases which stand for the proposition that it is not erroneous in a murder trial to give the jury an instruction on voluntary manslaughter, even where there is no evidence of sudden heat. Wilkins, 716 N.E.2d at 957. Given that these pre-Wright cases have yet to be expressly overruled, we must conclude that, notwithstanding the fact that there was no evidence of sudden heat, the trial court did not commit reversible error in instructing the jury on voluntary manslaughter.

Having concluded that the trial court committed no reversible error in instructing the jury on voluntary manslaughter, we now address Watts's claim that the trial court committed fundamental error by failing to instruct the jury as to the definition of sudden heat.

Final Instruction No. 6 provided as follows:

> "The crime of Voluntary Manslaughter is defined by statute as follows:
>
> (a) 'A person who knowingly or intentionally kills another human being while acting under sudden heat commits Voluntary Manslaughter. The offense is a Class A felony if it is committed by means of a deadly weapon.'
>
> (b) 'The existence of sudden heat is a mitigating factor that reduces what otherwise would be Murder to Voluntary Manslaughter.'
>
> Before you may convict the defendant as charged, the State must have proved each of the following elements:
>
> (1) The defendant
> (2) knowingly or intentionally
> (3) killed
> (4) Roy C. Akins [sic]

(5) by means of a deadly weapon, and;
(6) that the defendant did the killing while acting under sudden heat.
If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of Voluntary Manslaughter, a Class A felony." Appendix at 63.

Watts maintains that the term "sudden heat" is a term of art not subject to common knowledge or readily understood by lay persons, and as such, the trial court should have instructed the jury as to its meaning. See Blanchard v. State, 802 N.E.2d 14, 33 (Ind. Ct. App. 2004) (noting that terms of art generally require further instruction explaining the legal definition of the word or term). Because Watts did not object to the contents of the instruction or tender an instruction defining sudden heat, Watts attempts to avoid waiver of the issue by asserting fundamental error.

The doctrine of fundamental error is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. Manuel v. State, 793 N.E.2d 1215, 1217-18 (Ind. Ct. App. 2003), trans. denied. A claim of fundamental error will not be successful absent a showing of grave peril and the possible effect on the jury's decision. Dawson v. State, 810 N.E.2d 1165, 1175 (Ind. Ct. App. 2004), trans. denied. Further, "'for error to be "fundamental," prejudice to the defendant is required.'" Id. (quoting Hopkins v. State, 782 N.E.2d 988, 991 (Ind. 2003)).

Here, even if we were to assume that the trial court erred in failing to instruct the jury on the definition of sudden heat, Watts's claim of fundamental error fails because Watts cannot demonstrate prejudice. As noted above, the crime of voluntary manslaughter is the crime of murder mitigated by evidence of sudden heat. The jury

apparently rejected Watts's version of events as evidenced by the fact that the jury did not find him guilty of the lesser included offenses of reckless homicide and involuntary manslaughter. The jury's guilty verdict on voluntary manslaughter indicates that the jury found that the evidence established all of the elements of murder, but further found that Watts acted under sudden heat. Although we noted above that there was no evidence to support a finding of sudden heat, the fact is that the jury found that Watts acted under sudden heat. If anything, Watts can only be said to have benefited from the voluntary manslaughter instruction, for he was convicted of a Class A felony rather than murder. We therefore cannot say that the error, if any, in failing to instruct the jury on the definition of sudden heat constituted fundamental error.

Finally, Watts argues that the trial court abused its discretion in imposing enhanced and consecutive sentences. Acknowledging our Supreme Court's decision in Smylie v. State, 823 N.E.2d 679 (Ind. 2005), Watts argues that the trial court could not rely upon his prior convictions as they were not proven to a jury beyond a reasonable doubt. In his brief, Watts noted that, at that time, a writ of certiorari was pending on the Smylie decision and specifically provided that in the event the Smylie decision was overturned, he wished to "tack on to the Smylie challenge . . . ." Appellant's Brief at 10. Since his brief was filed, the United States Supreme Court denied certiorari in Smylie. 126 S.Ct. 545 (2005).

Turning to the merits of Watts's claim, we note that Watts's challenge to his sentence is solely under the Blakely jury-sentencing requirement. Watts's challenge to his sentence fails for two reasons. First, as our Supreme Court held in Smylie, the

Blakely jury-sentencing requirement does not apply to consecutive sentences. 823 N.E.2d at 686. Secondly, a defendant's prior convictions are explicitly excluded from the Blakely jury-sentencing requirement. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Smylie, 823 N.E.2d at 682; Williams v. State, 838 N.E.2d 1019, 1020 (Ind. 2005); Walker v. State, 843 N.E.2d 50, 55 (Ind. Ct. App. 2006), trans. denied; DeWhitt v. State, 829 N.E.2d 1055, 1067 (Ind. Ct. App. 2005), reh'g denied.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.